IN THE

Supreme Court of the United States

October Term, 1956.

No. 540.

CIVIL AERONAUTICS BOARD, *Petitioner,*

vs.

IDA MAE HERMANN, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

Questions Presented.

The United States Court of Appeals for the Ninth Circuit has ruled that the trial court in an administrative subpoena enforcement case shall pass on certain judicial questions before the trial court may issue an order enforcing administrative subpoenas. The questions presented are:

Whether the court of appeals has discretion under the circumstances in this case, to require the district court to rule on the following questions:

1. Are the subpoenaed documents relevant and material.
2. Is the demand oppressive and unreasonable.
3. Will the privacy of individuals be invaded if the subpoenas are enforced.

Statute Involved.

Pertinent provisions of the Civil Aeronautics Act of 1938, as amended, 52 Stat. 977, 49 U. S. C. 401, *et seq.*, are set forth in the appendix to Petitioner's Brief, pages 43-48.

Statement.

The Civil Aeronautics Board seeks an order enforcing ten administrative subpoenas *ducus tecum* in this proceeding. The district court ordered the subpoenas enforced. The court of appeals remanded to the district court with instructions to pass upon certain judicial questions before the district court may order enforcement of the subpoenas.

The administrative subpoenas in question were issued by the Board during the course of an administrative enforcement proceeding before a Hearing Examiner of the Board. The administrative proceeding is designated "In the Matter of Great Lakes Airlines, Inc., Docket No. 6908".

The nineteen respondents in Docket No. 6908 consist of two air carriers, Great Lakes Airlines and Currey Air Transport, licensed by the Board to engage in interstate air transportation as irregular air carriers, twelve ticket agencies which engage in the sale of tickets for air transportation, two corporations which are alleged to supply gasoline products and perform banking functions, respectively, for other administrative respondents, Ida Mae Hermann and Irving E. Hermann, individually, and as co-partners engaging in the leasing of aircraft. The issues in Docket No. 6908 relate to alleged violations by the above named administrative respondents of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49

U. S. C. 401 *et seq.*), and the regulations of the Board promulgated thereunder. These alleged violations relate to (1) frequency and regularity of flight operations; (2) acquisition and maintenance of control by Ida Mae Hermann and Irving E. Hermann over Currey Air Transport and the ticket agent respondents without prior Board approval; and (3) various ticketing practices engaged in by the two air carrier respondents. There are no issues relating to air safety in the administrative proceeding.

The Board seeks an order in the administrative proceeding revoking the licenses of Great Lakes and Currey to engage in air transportation and requiring the other administrative respondents to cease and desist from engaging in air transportation directly or indirectly.

The administrative subpoenas are directed to the ten respondents in this proceeding, who are officers or employees of, or independent auditors or advertising agencies performing services for, the respondent companies in Docket No. 6908.

The administrative subpoenas are summarized in the appendix. (*Infra*, pp. 1-4.) Most of the subpoenas cover a period of thirty-eight months.[1] The subpoenas were resisted before the Hearing Examiner who overruled a motion to quash [R. 61]. The Examiner's ruling was affirmed by the Board [R. 61-67]. Respondents continued to resist the subpoenas and the Board initiated this proceeding in the district court by filing a petition to enforce administrative subpoenas [R. 3-13].

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[1]One subpoena is unrestricted as to time [R. 51-53], while four subpoenas cover a period of thirty-four months commencing in May, 1952 [R. 54-55, 55-56, 58-59, 60].

Respondents raised the following arguments before the district court in resisting the Board's petition for enforcement: (1) the subpoenas are oppressive and unreasonable in scope; (2) compliance with the subpoenas would unduly and unreasonably hamper and interfere with the conduct of business by the administrative respondents; (3) the Board has many of the subpoenaed documents in its possession; (4) the subpoenas call for documents which are neither relevant nor material to the issues in Docket No. 6908; (5) the Board is required to prove that the documents sought are relevant and material to the issues in Docket No. 6908; (6) the subpoenas constitute an unreasonable search and seizure and a general fishing expedition; (7) the subpoenas call for records and documents which relate solely to personal affairs of certain individuals; and (8) the Board should inspect the subpoenaed documents as authorized by statute and limit the subpoenas in view of the other defenses raised [R. 72-73, 109-115].

Affidavits supporting the foregoing contentions were filed with the district court [R. 107-115, 129-142]. The facts alleged in these affidavits were not contradicted by the Board.

The proceedings before the district court were heard entirely on affidavits. Initially, the district court continued the cause on condition that certain of the respondents permit Board representatives to inspect and copy the documents called for in the subpoenas [R. 115-117]. In accordance with this order, six Board representatives inspected and copied the documents called for in these subpoenas during the period April 7 through April 15, 1955 [R. 117-121, 123]. At the resumed hearing, the Board

presented affidavits, without notice to the administrative respondents, which purported to show that respondents had not complied with the inspection order of the district court [R. 117-125]. The district court, without further notice or argument on the merits, ordered the subpoenas enforced exactly as written[2] [R. 126-129].

Upon rehearing,[3] the district court ordered all of the subpoenas enforced as presented.[4] The district court stated in its Memorandum for Order [R. 143-144]:

> In laying the subpoenas alongside the charges in the Complaint, this Court cannot say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board, without an examination of all of the documents and things themselves, which this Court is not called upon to do at this stage of the proceedings.

On appeal, the court of appeals remanded and required the district court to pass on designated judicial questions.

The court of appeals found that "the period covered by the documents required under most of the subpoenas is thirty-eight months," and that "the individual subpoenas

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[2]With the exception of the supoena served upon respondent Leonard Rosen, which was not pressed by the Board [R. 57].

[3]The counter-affidavits filed by respondents apparently convinced the district court that respondents had complied with the court's inspection order, since the court allowed a rehearing. In these affidavits, respondents urged that they had complied with the inspection order as the basis for a rehearing [R. 129-142].

[4]With the exception of the subpoena served upon respondent Rosen. The court staggered the return dates of the subpoenas [R. 144-146]. This order was stayed pending appeal [R. 154, 161-162].

are comprehensive of practically all records, books and documents of or concerning the companies engaged in Docket No. 6908" [R. 168]. The court of appeals found that the Board had failed to show the relevance and materiality of the documents sought in the administrative subpoenas[5] and that the Board did not have on file the documents subpoenaed.[6] The court of appeals held that the district court had failed to pass upon the judicial questions in the case in that the district court had made no findings that any of the subpoenaed documents were relevant or material and had taken no position upon the questions whether the demand was oppressive or unreasonable or whether some subpoenaed documents related entirely to the personal affairs of three of the respondents before this court [R. 170-172]. The district court, on remand, was required to resolve the following questions [R. 173]:

1. Have the documents been sufficiently defined and described in the administrative subpoenas.

2. Are the subpoenaed documents relevant and material.

3. Is the demand oppressive and unreasonable.

4. Will the privacy of individuals be invaded if the subpoenas are enforced.

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[5] "It seems to be conceded that there was no showing of relevancy or materiality of the documents sought in the administrative subpoenas at any time during the hearings" [R. 169].

[6] "There was no showing that the Board did not have on file itself the documents sought therein" [R. 169]. The respondents had presented affidavits which demonstrated that some of the subpoenaed documents were on file with the Board [R. 110, 111, 112, 113-114, 133-134, 139].

Summary of Argument.

This argument seeks to establish the proposition that a court in an administrative subpoena enforcement case should pass upon certain judicial questions before it may enforce subpoenas. The subpoenas in question call for a wide variety of documents covering an extensive period of time. The district court enforced the subpoenas because it could not say that the documents called for are "immaterial or irrelevant to the proceedings before the Board" [R. 143]. The court of appeals required the district court on remand to determine whether the Board's demand is oppressive or unreasonable, whether the documents subpoenaed are relevant and material to the issues in the administrative proceeding and whether the privacy of individuals would be invaded unnecessarily if the subpoenas are enforced. The court of appeals held that the district court had failed to pass upon these judicial questions.

The court of appeals has latitude to require the district court to pass upon these judicial questions since the district court failed to discharge the duties and responsibilities of a trial court in a subpoena enforcement case.

It is settled that oppressiveness or unreasonableness of the demand is a proper defense in administrative subpoena enforcement cases. (*Hale v. Henkel*, 201 U. S. 43, 76-77.) We shall describe the variety and extent of the documents called for in the subpoenas and the burden of production. In the course of demonstrating that the

In a Proceeding to Enforce Broad Administrative Subpoenas Duces Tecum, the Court Should Determine Whether the Board's Demand Is Oppressive or Unreasonable, Whether the Subpoenaed Documents Are Relevant and Material and, Where Appropriate, Whether the Privacy of Individuals Will Be Invaded Unnecessarily Before It Enforces the Subpoenas.

A. The District Court Should Determine Whether the Board's Demand Is Oppressive or Unreasonable.

1. The court of appeals required the district court on remand to rule whether or not the demand contained in the subpoenas is oppressive and unreasonable [R. 173]. These questions can be resolved only by analysis of the subpoenas in the light of the issues in the administrative proceeding. The subpoenas are contained in the Transcript of Record [R. 39-60] and, for convenience, are summarized in the appendix (*infra*, pp. 1-4).

The district court made no findings regarding the scope of the demand. The court of appeals found that "the period covered by the documents required under most of the subpoenas is thirty-eight months" and that "the individual subpoenas are comprehensive of practically all records, books and documents of or concerning the companies engaged in Docket No. 6908" [R. 168].

The subpoenas directed to the officers and employees of the administrative respondents are particularly comprehensive.[7] We have directed our comments principally

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[7]These subpoenas were directed to respondents Ida Mae Hermann [R. 39-43], Irving E. Hermann [R. 43-47], Robert M. Smith [R. 47-50], H. C. Richards [R. 54-55], George Patterson [R. 55-56] and G. D. Thompson [R. 60], and call for documents of Great Lakes Airlines, Currey Air Transport, Air International, Inc., Nevada Aero Trades Company and Great Lakes Airlines Agency.

to the subpoenas calling for the records of Great Lakes Airlines and Currey Air Transport, the two air carrier respondents [R. 39-50, 54-56, 60].

The record shows that considerable documentation is involved in conducting business as an air carrier and that the two named air carriers are required to adhere to the extensive record keeping and reporting requirements of (1) the Civil Aeronautics Administration, with respect to safety and operational matters, and (2) the Board with respect to economic matters [R. 110-112, 133-134, 139]. Great Lakes requires approximately 50 to 75 documents in connection with each flight it operates [R. 110]. Great Lakes also has an extensive maintenance division which performs overhaul and maintenance services upon aircraft operated by Great Lakes and other airline companies [R. 110].

Great Lakes has approximately 75 employees engaged in its flight operations and maintenance activities [R. 109-110]. It can readily be seen that the production of all of the individual personnel and payroll records and vouchers for a period of thirty-eight months calls for a substantial number of documents. The relevance of these records has not been shown. It is particularly difficult to imagine the relevance of personnel records relating to maintenance division mechanics and other employees since there are no issues in this proceeding pertaining to air safety.

Great Lakes issued approximately 2500 tickets per month during the period covered by the subpoenas [R. 111-112]. One subpoena calls for the production of three coupons for each ticket sold during the months of June and November for three years, 1952 through 1954, inclusive

[R. 40-41]. This one item in one subpoena calls for 45,000 ticket coupons.[8] Respondents' estimate of the time involved in producing these ticket coupons is ten weeks provided a trained person was devoted to this particular job [R. 111-112]. Currey issued an equal number of tickets and is called upon to produce all of the coupons for tickets sold during the same months as Great Lakes [R. 48].[9] The Board has merely designated all these ticket coupons as a class and has stated that it requires all of them. No further showing has been made.

Another item contained in the subpoenas which is susceptible to ready analysis is the demand for all cancelled checks and bank statements of five administrative respondents for a thirty-eight month period [R. 40, 44-45, 48]. Great Lakes issued approximately 300 checks per month during this period [R. 111]. Accordingly, more than 11,000 cancelled checks are required of Great Lakes. The estimated number of bank statements and cancelled checks for four administrative respondents is 25,000 items [R. 111]. The Board has not demonstrated why it required all of these cancelled checks (most of which relate to transportations with third parties) to be brought to the hearing room in response to the subpoenas.

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[8]The subpoena also calls for many specified tickets and for the flight, auditor and agent coupon of each ticket requested [R. 41-43]. While the subpoena calls for all copies of tickets actually sold to the public during the months of June and November in each of these three years, the Great Lakes tickets are filed by date of flight. Since many passengers purchase tickets in advance of their flight, it would be necessary to search through the ticket coupons for a period of months following, as well as the months named in the subpoenas [R. 111-112].

[9]The only flight data of record relates to Los Angeles-New York flights. Currey operated more flights than Great Lakes between these points during the years 1952 through 1954, inclusive [R. 36-38].

Each of the respondent companies in Docket No. 6908 is required to produce all of its general ledgers and all subsidiary books and ledgers and all vouchers, invoices, journals and other supporting documents to the entries in said books and ledgers for a period of thirty-eight months [R, 40, 44, 48]. Great Lakes maintains a fairly elaborate system of books and its files contain supporting information for every ticket sold. Some 200,000 documents would have to be produced in order for three administrative respondents to comply with this phase of the subpoenas and respondents assert that it would require approximately two months to produce all of these documents [R. 111]. The Board has not demonstrated its need for the production of any particular set of books, ledgers or supporting documents or for all of them. The Board cannot dispute respondents' assertion that most of the vouchers, invoices or other supporting documents are unrelated to "any matter in question" which, after all, is neither the "structure nor the commercial history" of the administrative respondents. (*Goodyear Tire & Rubber Co. v. National Labor Relations Board*, 122 F. 2d 450, 453 (C. A. 6).)

Respondents estimate that they would have to search through 1,000,000 documents to locate and segregate the subpoenaed documents [R. 109]. While respondents have made no attempt to estimate the physical bulk of the documents required to be delivered up to the hearing officer, the court of appeals found that "truckloads of records" are involved which "are comprehensive of practically all records, books and documents of or concerning the companies engaged in Docket No. 6908" [R. 168, 170]. Respondents could not conduct their business with-

out the business records called for in these subpoenas [R. 114-115].

The foregoing facts pertaining to the burden of complying with the subpoenas are not challenged by the Board.

2. Oppressiveness or unreasonableness of the demand may be asserted as a defense in a subpoena enforcement case; enforcement will be denied by the courts if this defense is upheld. (*Hale v. Henkel*, 201 U. S. 43, 76-77; *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-307; *Bank of America v. Douglas*, 105 F. 2d 100, 106-108 (C. A. D. C.).)[10] The allowable breadth of administrative subpoenas is committed, not to administrative agencies, but to the courts. If the demand is "in any respect . . . unreasonable," appropriate defense may be made "surrounded by every safeguard of judicial restraint." (*Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 217.) The Civil Aeronautics Board is not expert on the allowable breadth of *subpoenas duces tecum.*

The court of appeals, in the light of the showing by respondents that the demand was unreasonable and

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[10]See, also, *McComb v. Hunsaker Trucking Contractor, Inc.*, 171 F. 2d 523, 525 (C. A. 5); *Goodyear Tire & Rubber Co. v. National Labor Relations Board*, 122 F. 2d 450, 453-454 (C. A. 6); *National Labor Relations Board v. Pesante*, 119 Fed. Supp. 444, 458-459 (DC-SD Calif.); the same result has been reached in cases involving grand jury subpoenas. *In re United Shoe Machinery Corporation*, 6 F. R. D. 347, 349 (DC-D. Mass.); *In re United Last Company*, 7 F. R. D. 759 (DC-Mass.).

A Hoover Commission task force took the position that unlimited application of the analogy between administrative and grand jury subpoenas "would be extremely unwise." Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedures, March, 1955, page 175. (U. S. Government Printing Office.)

oppressive, required the district court on remand to pass upon the judicial question of reasonableness or oppressiveness of the demand. The court of appeals held that the district court had failed to pass upon this issue.

3. The Board is given extremely broad powers of inspection of all documents kept by air carriers and their affiliates in Section 407(e) of the Act. An inspection of the facilities of some of the administrative respondents was conducted by the Board under the supervision of the district court which the court of appeals found to be extremely fair and "if it had been pursued for a sufficient length of time, would have permitted the Board to issue subpoenas for the exact documents which they wished" [R. 172-173]. The court of appeals suggested that it might be appropriate to continue the inspection and limit the subpoenas to the documents required [R. 170-171]. This was entirely proper in view of the broad sweep of the subpoenas.

The court of appeals did not hold, as suggested by the Board (Pet. Br. p. 31) that the Board is required to exercise its inspection powers in all cases before its subpoenas may be enforced. The court of appeals merely required the district court on remand to determine whether the demand is oppressive and whether the documents are relevant and material.[11] [R. 173.] Where the demand is sweeping, as here (comprehensive of all records for a thirty-eight month period), it cannot be supposed that the courts are required to close their eyes to this obvious means

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[11]We do not understand the court of appeal's decision to require additional inspection by the Board unless the district court is otherwise unable to determine relevancy and materiality and reasonableness of the demand, on remand.

of resolving the conflict between the Board's evidentiary needs and the right of the administrative respondents to be free from oppressive administrative action and unreasonable searches and seizures.[12] This court has had occasion to limit the subpoena power, because it "is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer." (*Cudahy Packing Co., Ltd. v. Holland,* 315 U. S. 357, 363; *United States v. Minker,* 350 U. S. 179, 187.)

The Board insists that its subpoena and inspection powers are independent of each other (Pet. Br. pp. 31-32). Whether or not this is true, "the terms [inspection requirement and subpoena] are so nearly synonymous that this court did not distinguish between them." (*Porter v. Gantner & Mattern Co.,* 156 F. 2d 886, 890 (C. A. 9).)[13]

Inspection of the records of the administrative respondents at their respective premises serves a useful purpose in that the administrative respondents will be able to conduct their respective businesses and have access to

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[12]See *Federal Trade Commission v. Menzies,* 145 Fed. Supp. 164, 170-171 (D.C.-D. Maryland).

[13]The Board relies upon this case to show that the subpoena and inspection powers are independent of each other (Pet. Br. pp. 31-32.) The court also stated, at 156 F. 2d 890: "Both are formal documents having the same end in view and are subject to similar limitations. A subpoena is somewhat broader and may require production of records at a place other than that in which they are ordinarily kept. But in some instances even this distinction may be lacking." See, also, *Westside Ford, Inc. v. United States,* 206 F. 2d 627, 634-635 (C. A. 9), where the court ordered an inspection at respondent's premises although the administrative agency sought enforcement of a subpoena.

their records[14] "without the necessity of bringing truckloads of records to the hearing officer" [R. 170]. There is no basis for the Board's unsupported supposition that the respondents will not permit inspection of their records (Pet. Br. p. 32) since respondents permitted unrestricted access to their records during the inspection under the direction of the district court [R. 129-142] which if, "continued to its logical end, the Board could have limited the subpoenas to documents which everyone would have recognized were relevant and material" [R. 173].[15]

4. The respondents have demonstrated that many of the subpoenaed documents are in the possession of the Board, including all balance sheets and profit and loss statements of Great Lakes and Currey [R. 111, 134, 139], all advertising materials of Great Lakes[16] [R. 41, 112, 133-134] and all pertinent data contained in aircraft maintenance logs.[17] It is self-evident that documents in the possession of the Board need not be produced. (*Application of Linen Supply Companies*, 15 F. R. D. 115, 119 (D. C. S. D., N. Y.).) In the light of the uncontradicted proof that the Board had many of the subpoenaed docu-

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[14]Respondents claim that the documents subpoenaed are necessary to the conduct of their businesses, which claim is not challenged by the Board [R. 114-115].

[15]While the Board contends that the district court properly enforced the subpoenas (Pet. Br. pp. 32-42), it pointedly takes no position on the propriety of the inspection order of the district court.

[16]Except one minor item for which the company paid the sum of $7.00 [R. 133].

[17]Matter contained in aircraft logs which is not filed with the Board relates entirely to air safety matters not at issue in this proceeding [R. 113-114].

ments in its possession, the court of appeals properly concluded that the subpoenas should not be enforced as presented.

B. The District Court Should Determine Whether the Subpoenaed Documents Are Relevant and Material.

1. The Board is required to show materiality and relevancy of the documents subpoenaed in order to obtain judicial enforcement of administrative *subpoenas duces tecum* calling for a vast number of documents designated only by general classes. (*Hale v. Henkel,* 201 U. S. 43, 77; *Federal Trade Commission v. American Tobacco Co.,* 264 U. S. 298, 307; *Goodyear Tire & Rubber Co. v. National Labor Relations Board,* 122 F. 2d 450, 453 (C. A. 6).)[18]

The Board has failed to introduce evidence of relevancy or materiality of the subpoenaed documents; instead, it relies entirely upon the charges outlined in the administrative complaint [R. 14-39].[19] The district court stated that it could not say that any of the subpoenaed documents were "immaterial or irrelevant to the proceeding before the Board" and enforced the subpoenas [R. 143-146]. The court of appeals remanded the case to the district court with instructions to determine whether the documents are material and relevant [R. 173].

This court has held that where the demand for documents is broad, the Board must produce "some evidence

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[18]See, also, *Boren v. Tucker,* 239 F. 2d 767, 773 (C. A. 9); *McComb v. Hunsaker Trucking Contractor, Inc.,* 171 F. 2d 523, 525 (C. A. 5); *Bowles v. Cherokee Textile Mills,* 61 Fed. Supp. 584, 585-586 (D.C.-E.D. Tenn.); *Cf. Brown v. United States,* 276 U. S. 134, 142-143.

[19]The Board insists that it need only show "general" relevance (Pet. Br. pp. 10, 16, 17).

of their materiality . . . to justify an order for the production of such a mass of papers." (*Hale v. Henkel*, 201 U. S. 43, 77.) Similarly, "some evidence of the materiality of the papers demanded must be produced." (*Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 306.) The respondents have shown that many of the documents subpoenaed are not relevant and while their judgment regarding relevancy and materiality "was not final, at least some *evidence* must be offered to show that it was wrong". (emphasis supplied). (*Federal Trade Commission v. American Tobacco Co., supra*, p. 307.) Before the court will order an administrative subpoena enforced "it must appear from evidence that the papers, documents or evidence sought are material to a determination of the matter under investigation." (*Bowles v. Cherokee Textile Mills*, 61 Fed. Supp. 584, 586 (D. C. E. D., Tenn.).)

The court of appeals has discretion to require a showing of materiality and relevancy from the Board before an order of enforcement issues in view of the sweeping demand and the Board's failure to introduce evidence of materiality or relevancy or to exercise its statutory power of inspection provided in Section 407(e) of the Act.[20] The court is required to balance the legitimate evidentiary needs of the Board and the unquestioned right of the respondents to be free from unreasonable searches and seizures and arbitrary administrative action. (*Hale v. Henkel*, 201 U. S. 43, 76-77; *McComb v. Hunsaker Trucking Contractor*, 171 F. 2d 523, 525 (C. A. 5).) The

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[20]The Board failed to produce any evidence of materiality or relevancy after examining many of the subpoenaed documents during the course of the inspection under the direction of the district court [R. 169].

court of appeals determined that this balance could best be achieved by requiring the district court to determine whether the documents subpoenaed are relevant and material. In subpoena enforcement cases, "courts act as courts and not as administrative adjuncts" and they discharge "judicial power with all the implications of the judicial function in our constitutional scheme." Justice Frankfurter dissenting in *Penfield Co. of California v. Securities and Exchange Commission,* 330 U. S. 585, 604.[21] We submit that the court of appeals properly "was exercising judicial power" while the district court served as an "administrative adjunct."

2. The statement of the district court that it was unable to say the subpoenaed documents are "immaterial or irrelevant" without an examination of the documents [R. 143] is not tantamount to a finding that the documents are relevant and material. The district court placed the burden of proof upon the respondents. This distinction, we submit, is a matter of substance, not semantics.

The district court had before it no evidence tending to establish materiality and relevance. Although the court was able to see some connection, no matter how tenuous, between the charges and some of the subpoenaed documents, it was unable to make a finding that the documents were relevant or material. By way of example, the district court could not find that "all . . . supporting documents to the entries in said books and ledgers" of

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[21]See, also, *Interstate Commerce Commission v. Brimson,* 154 U. S. 447, 479, 485, 489; *General Tobacco & Grocery Co. v. Fleming,* 125 F. 2d 596, 599 (C. A. 6).

all the respondent companies, including "all vouchers, invoices [and] journals" [R. 40, 44, 48], were relevant or material since many of these documents quite obviously pertain to business matters conducted by the administrative respondents with third parties bearing no conceivable relationship to the charges before the Board. Rather than determine the point, the district court passed it over with the remark that it could not say that the documents were irrelevant or immaterial. In this regard, we submit, the district court rubber-stamped the actions of the Board and "failed to pass upon the judicial question presented to him in the case" [R. 171]. The Board is entitled only to "documentary evidence—not to all documents, but to such documents as are evidence." (*Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 306.)

3. The Board must establish the proposition that the court of appeals does not have discretion to require a showing of relevancy and materiality from the Board to overturn the decision in this case.[22] This burden is increased materially by the showing made by respondents with regard to the vast number of documents sought, the burden placed upon respondents in delivering up the documents, the need for the documents to conduct day-to-day business affairs, the failure of the Board to exercise its

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[22]It should be noted that the court of appeals stated that the showing of materiality and relevancy as to the records of entities and individuals directly under control of the Board "might not necessarily be as comprehensive as that required in other cases" since the Board "should have considerable leeway in order not to hamper its functions" [R. 172].

statutory inspection power and the fact that the Board had many of the subpoenaed documents in its possession.[23] The Board also failed to introduce any evidence tending to establish relevancy or materiality after it had examined and photographed many of the subpoenaed documents.

The Board attempts to discharge the burden of demonstrating that the court of appeals exceeded its allowable area of discretion by indicating that courts faced with differing factual situations, enforced administrative subpoenas on the showing that the documents sought were not "plainly incompetent or irrelevant to any lawful purpose,"[24] "probably relevant"[25] or "relates to or touches the

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[23]It should also be noted that the documents are only designated loosely by class, except for particular ticket coupons [R. 42-43, 50].

[24]"Not plainly incompetent or irrelevant." *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, is discussed in Footnote 27, *infra*. *McGarry v. Securities and Exchange Commission*, 147 F. 2d 389, 392 (C. A. 10). The court stated that the test of the validity of the subpoena is whether the documents called for are pertinent and relevant to the inquiry and added the important qualification that "the process is lawful if it confines its requirements within the limits which reason imposes in the circumstances of a particular case." (147 F. 2d 392.) This proceeding concerned an administrative investigation and was not a "trial or adversary" proceeding.

[25]"Probably relevant." *Smith v. Porter*, 158 F. 2d 372, 374 (C. A. 9), certiorari denied, 331 U. S. 816. The quoted language is clearly dictum because respondent had argued that the subpoena and court order enforcing the subpoenas were void and unlawful for reasons totally unrelated to relevance and materiality of the documents demanded. "No point is made [by the respondent] as to the materiality of any particular document called for in the subpoena." (158 F. 2d 374.) In the absence of objection by the respondent, the court said that the documents were probably relevant to the inquiry, which was an investigation by the Office of Price Administration and not a "trial or adversary" proceeding.

matter under investigation."[26] Many of the cases cited by the Board are concerned with disputes over "coverage" of the regulatory statute. This court has held that "coverage" properly is committed to the expertise of the administrator while questions of materiality, relevancy and burden of the demand, being judicial questions, are to be determined by the court in administrative subpoena cases.[27]

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[26]"Relates to or touches upon the matter under investigation." *Cudahy Packing Co. v. National Labor Relations Board*, 117 F. 2d 692, 694 (C. A. 10), concerned a subpoena, calling for a limited group of documents issued by the National Labor Relations Board to obtain information pertinent to an election to select the bargaining representative of respondents' employees and was not a "trial or adversary" proceeding. Respondent's principal objection to the subpoena was that the Board's order directing the election was void because of arbitrary and capricious acts committed and delays caused by the Board. The quoted language is dictum and merely paraphrases the statute giving the district court jurisdiction to enforce the administrative subpoena. The court stated (117 F. 2d 693) that the respondent "does not . . . contend that the evidence sought by the Board does not relate to the subject under investigation."

[27]*Endicott Johnson v. Perkins*, 317 U. S. 501; *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186. The documents subpoenaed in the *Endicott Johnson* case were conceded to be relevant insofar as certain plants were concerned; the respondent objected to producing the same payroll records for plants which it contended were outside the Secretary's jurisdiction. In the *Oklahoma Press* case, the court made a specific finding that "all the records sought were relevant to the inquiry," 327 U. S. 186, 210. In this case, the administrator conceded that questions of relevancy and breadth of the demand were for the court to determine and the court stated that these issues were "neither minor nor ministerial matters." 327 U. S. 186, 217, Note 57. The subpoena in the *Oklahoma Press* case (Pet. Br. p. 20) was limited strictly to documents bearing directly on the issues of coverage and, in connection with violations of the Act, to wages and hours of employment. Both the *Endicott Johnson* case and the *Oklahoma Press* case involved exploratory administrative investigations rather than "trial or adversary" proceedings.

4. Docket No. 6908 is an adversary administrative proceeding or formal complaint case where the Board seeks an order revoking the licenses of the two air carrier respondents to engage in air transportation and an order requiring the other administrative respondents to cease and desist from engaging in air transportation directly or indirectly. In short, the Board seeks to put all of the administrative respondents out of business. Virtually every case concerning administrative subpoenas relied upon by the Board, involved an exploratory administrative investigation.[28] There is a real distinction between the allowable breadth of *subpoena duces tecum* issued in an exploratory administrative investigation, on the one hand, and administrative *subpoena duces tecum* issued in the course of a trial or adversary proceeding on the other hand. "The standards of materiality or relevancy are far less rigid in an *ex parte* inquiry to determine the existence of violations of a statute, than those applied in a trial or adversary proceeding." (*Hagen v. Porter*, 156 F. 2d 362, 365 (C. A. 9), certiorari denied 329 U. S. 729; *Westside Ford, Inc. v. United States*, 206 F. 2d 627, 632 (C. A. 9); *Cf. United States v. Morton Salt Co.*, 338 U. S. 632, 641-643.) This distinction was relied upon by the court of appeals in the instant case in concluding that the Board had failed to demonstrate materiality and relevancy [R. 172]. The effect of this distinction is to require a more precise showing of materiality and relevancy in an adversary administrative proceeding than in an exploratory

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[28]See Footnotes 24 through 27, *supra*; *cf. United States v. Morton Salt Co.*, 338 U. S. 632, 641-643.

administrative investigation.[29] In the former case the administrative body seeks to prove defined charges, while in the latter case it is merely gathering information.

5. The Board interprets the decision of the court of appeals to mean that each individual document subpoenaed must be identified and demonstrated to be material and relevant before the district court may enforce the subpoenas (Pet. Br. p. 27). We do not believe that the court of appeals established such a test; the district court may order enforcement so long as it is satisfied that "each (document) is material and relevant" [R. 173]. This test may be satisfied by a showing that defined groups of documents are relevant and material particularly such groups as are identified by subject matter rather than by general classification, as these subpoenas are not written. (*Hale v. Henkel*, 201 U. S. 43, 76-77; *cf. Brown v. United States*, 276 U. S. 134, 142-143; *McGarry v. Securities and Exchange Commission*, 147 F. 2d 389, 392 (C. A. 10).) The subpoenas in their present form do not call for "evidence" as the term was used by Mr. Justice Holmes in *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 306, where this court stated:

> The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it.

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[29] We cannot agree with the Board's contention that this distinction arises because the issues in an investigation often are broader than those in a formal complaint case (Pet. Br. pp. 36-38).

The statute under consideration in the *American Tobacco* case authorizing issuance and enforcement of administrative subpoenas is virtually identical to the statute with which we are concerned.[30] The fact that some of the subpoenaed documents appeared to be relevant and material did not deter this court in the *American Tobacco* case from refusing to enforce of the administrative subpoenas. We acknowledge the relevancy and materiality of some of the subpoenaed documents. Our objections go, primarily, to the many documents which are irrelevant and immaterial and to the oppressive demand of the subpoenas. Similarly, it was held where a subpoena calls for all of the cards in an employee card index, the fact that some of the cards clearly were relevant and some of the other cards might be relevant to the issues in the administrative proceeding, "does not warrant a demand for the whole." While respondent's "conclusion that this index is not relevant is not final, at least some evidence must be offered to show that it is wrong." (*Goodyear Tire & Rubber Co. v. National Labor Relations Board,* 122 F. 2d 450, 453 (C. A. 6).)

The Board also insists that it is not required to demonstrate materiality or relevancy of the subpoenaed documents until they are offered in evidence (Pet. Br. pp. 23-24, 28). The answer to this contention is that administrative respondents would never have their day in court to assert that the demand is oppressive or unreason-

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[30] "the Commission shall, at all reasonable times, have access to, for the purposes of examination, and the right to copy, any documentary evidence of any corporation being investigated or proceeded against, and shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." (264 U. S. 304.)

able, since lack of materiality or relevancy and oppressiveness of the demand are clearly interrelated and the documents, according to the Board, must first be delivered to the hearing officer before these issues may be raised. We have demonstrated that oppressiveness or unreasonableness of the demand is a proper defense in a subpoena enforcement case (*supra*, pp. 14-15).

C. The Right of Privacy of Individuals Will Be Invaded Unnecessarily if the Subpoenas Are Enforced.

Certain of the subpoenas call for the personal income tax returns of three individuals for three years [R. 40, 45, 48]. Two of these individuals (Ida Mae and Irving E. Hermann) are respondents in the administrative proceeding and the third individual (Robert M. Smith), while not a respondent, is alleged to be a minority stockholder and officer of Currey Air Transport, an administrative respondent allegedly controlled by the Hermanns [R. 22-25].[31] The district court enforced the subpoenas, including the personal income tax returns, because it could not "say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant" [R. 143]. The court of appeals required the district court on remand to determine "whether the privacy of individuals has been invaded" by requiring production of these personal income tax returns over objection that the returns relate entirely to personal affairs [R. 173]. The court of appeals stated that on taking testimony, this objection may prove "deceptive and illusory" but that "the privacy of individuals as against

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[31]The administrative complaint also alleges that Robert M. Smith was formerly employed by the administrative respondent, Great Lakes Airlines [R. 23].

require defendants to submit their income tax returns for copying." (*Garrett v. Faust*, 8 F. R. D. 556, 557 (D.C.-E.D., Pa.).)

The Board's sweeping demand, the availability of other documents to the Board through use of its statutory inspection powers, the failure of the Board to show materiality or relevancy, and the availability of the same information by the production of other documents or "direct from the witnesses for the asking," make it clear that the court of appeals did not exceed its allowable discretion in requiring the district court to rule whether or not production of personal income tax returns unnecessarily violated the right of privacy of individuals.

Conclusion.

Upon the basis of the foregoing reasons and authorities, the judgment of the court of appeals should be affirmed.

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Attorneys at Law,
Of Counsel.

APPENDIX.

Summary of Subpoenas.

Great Lakes Airlines, Currey Air Transport, Air International Inc., Great Lakes Airlines Agency, Inc., and Nevada Aero Trades, Company are called upon to produce the following documents for a 38-month period, January 1, 1952 through February 25, 1952:*

1. *All* general ledgers and *all* subsidiary books and ledgers, and *all* vouchers, invoices, journals and other supporting documents to the entries in said books and ledgers.

2. *All* audit report, financial statements (balance sheets, schedules of cash receipts and disbursements, and profit and loss statement).

3. *All* minutes and notes of directors' and stockholders' meetings, stock record books and *all* stock certificates.

4. *All* bank statements and cancelled checks.

5. *All* income tax returns for the years 1951 through 1954, inclusive.

6. *All* correspondence, contracts, agreements and options between any of the nineteen (19) Respon-

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*The Great Lakes documents were called for in the subpoenas served upon Respondents Ida Mae Hermann [R. 39-43], H. C. Richards [R. 54-55], George Patterson [R. 55-56] and Capt. G. D. Thompson. [R. 60.] The Currey documents were called for in the subpoenas served upon Respondents Robert M. Smith [R. 47-50]. The documents of Air International, Inc. and Nevada Aero Trades Company were also called for in the subpoena served upon Respondent Ida Mae Hermann. [R. 39-43.] The Great Lakes Airlines Agency, Inc. documents were called for in the subpoena served upon Respondent Irving E. Hermann. [R. 43-47.]

dents in Docket No. 6908 and between any of them and Robert M. Smith and Arthur R. Currey.[b]

7. *All* individual, personnel and payroll records and vouchers.

Great Lakes and Currey, the Air Carrier Respondents in Docket No. 6908, are called upon to produce the following additional documents for the same 38-month period, January 1, 1952 through February 25, 1955:[c]

8. Specimens of *all* handcards, brochures, schedules and other advertising material distributed to the public by Great Lakes, Currey and/or their ticket agents.

9. Specimens of each type of ticket and exchange order sold to the public during the years 1952 through 1954, inclusive, by Great Lakes, Currey and/or their ticket agents.

10. *All* flight, auditor and agent coupons taken from documents actually sold to the public by Great Lakes, Currey, and/or their ticket agents during the months of June and November for the years 1952 through 1954, inclusive.

11. Specimen copies of *all* advertisements subscribed for by, or on behalf of Great Lakes and Currey.

12. All flight personnel assignment sheets, aircraft scheduling sheets, operations manuals, operations specification sheets for aircraft identification (Form ACA-518A), and pilot rosters.

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[b]All correspondence between Ida Mae Hermann and Irving E. Hermann, husband and wife, is included.

[c]Except as hereinafter noted in items 9, 10, 14, 15, 16 and 17.

13. *All* contracts, agreements and memoranda related to lease of office, ticket counter and maintenance space and facilities.

14. Specific flight, auditor and agent ticket coupons used in connection with various flights in 1953 and 1954.

15. *All* flight personnel assignment sheets or charts and minutes of *all* pilot meetings since May 1, 1952.

16. For the period May 7, 1952, through March 9, 1955, the following:

a. *All* aircraft maintenance logs for aircraft owned or operated by Currey and Great Lakes;

b. *All* aircraft identification sheets (Form ACA-518A) prepared by or for Currey and Great Lakes;

c. *All* aircraft utilization sheets prepared by and/or for Currey and Great Lakes;

d. *All* aircraft lease agreements and correspondence and memoranda relating thereto for aircraft operated by Currey and Great Lakes.

17. *All* aircraft routing sheets, aircraft assignment sheets and ship distribution charts prepared and/or used by Great Lakes and Currey since May 1, 1952.

18. Great Lakes is also directed to produce *all* Bills of Sale, Chattel Mortgages, Certificates of Registration, and Liens reflecting chain of title of aircraft owned and/or operated by Great Lakes and Nevada Aero Trades Company for the same 38-month period.

19. Respondent M. B. Scott is directed to produce *all* correspondence (letters, telegrams, notes and memoranda) between M. B. Scott, Inc. and eighteen

(18) of the Respondents in Docket No. 6908, and *all* correspondence, invoices, statements and insertion orders in which the said eighteen (18) Respondents are mentioned and *all* ledger sheets in the possession of M. B. Scott, which contain information regarding transactions with any of the said eighteen (18) Respondents; and copies of *all* insertion orders for radio or television advertising and orders for the printing of brochures and other advertising materials placed with M. B. Scott, Inc. by any of the said eighteen (18) Respondents. There is no time limitation or restriction whatsoever pertaining to the M. B. Scott subpoena. [R. 51-53.]

20. Respondent Orville Kelman is directed to produce *all* correspondence, contracts, agreements, memoranda, work papers and audit reports relating to the nineteen (19) Respondents in Docket No. 6908, since May 1, 1952. [R. 58-59.]

21. Respondent Harold Shein is directed to produce the following records and documents of administrative Respondent Skycoach Agency of San Francisco, Inc., and any other entities using the style "Skycoach," for the period January 1, 1952, through February 21, 1955, inclusive: Copies of *all* quarterly recapitulations of payrolls and payroll tax sheets, together with any notes or memoranda indicating to whom such copies were provided and *all* copies of weekly recapitulations of receipts or disbursement sheets with notes or memoranda indicating to whom such copies were provided. [R. 53-54.]

22. Respondents Ida Mae Hermann, Irving E. Hermann and Robert M. Smith also are directed to for the calendar or fiscal years 1951 through 1954. produce their respective personal income tax returns [R. 40, 45, 48.]

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1957.

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